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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

AEROJET-GENERAL CORPORATION, Plaintiff and Appellant, v. TRANSCONTINENTAL INSURANCE COMPANY et al., Defendants and Respondents.	C036514 (Super. Ct. No. CV527932)
AEROJET-GENERAL CORPORATION, Plaintiff and Appellant, v. UNITED STATES FIRE INSURANCE COMPANY et al., Defendants and Appellants.	C037097 (Super. Ct. No. CV527932)

This insurance dispute concerns excess insurance for claims arising from alleged pollution at the Azusa, California site of

plaintiff Aerojet-General Corporation (Aerojet).[1] Aerojet appeals from a judgment entered following a grant of summary judgment in favor of the following "Excess Insurers": United States Fire Insurance Company (U.S. Fire); American Home Assurance Company; American International Reinsurance Company, Inc.; Columbia Casualty Company; Commercial Union Insurance Company; Continental Casualty Company; Continental Insurance Company; Fireman's Fund Insurance Company; General Reinsurance Corporation; Harbor Insurance Company; The Home Insurance Company; The Insurance Company of the State of Pennsylvania; New England Reinsurance Corporation; North Star Reinsurance Corporation; The Seven Provinces Insurance Company N.V.[2]; and Transcontinental Insurance Company. Aerojet also appeals from a separate judgment entered in favor of California Insurance Guarantee Association (CIGA).

Aerojet contends the trial court erred in ruling that lack of exhaustion of primary insurance precluded the triggering of excess insurance coverage. Aerojet also argues the trial court erred in ruling that a pollution exclusion in some insurance policies barred coverage--a matter we have decided adversely to Aerojet in a separate appeal involving other insurers, C035040.

Some of the Excess Insurers cross-appeal, contending the trial court erred in denying their request for summary

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[1] Other Aerojet sites are the subject of other litigation.

[2] Pursuant to stipulation of the parties and this court's order, the appeals of November 21, 2000, and September 12, 2000, have been dismissed only as to Seven Provinces Insurance Company.

adjudication that the earlier indemnity ruling necessarily precluded any prospective duty to defend.

We shall conclude (as did the trial court) that Aerojet failed to show exhaustion of primary insurance so that the Excess Insurers have no present duty to defend or indemnify Aerojet. However, we disagree with the trial court's determination that Aerojet will *never* be able to show exhaustion. We also reject Aerojet's claim that certain insurance policies should not be subject to the trial court's judgment. We shall also reject the cross-appeal.[3]

We shall therefore modify the judgment to strike the trial court's determination that Aerojet will *never* be able to show

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[3] The notice of cross-appeal was filed by U.S. Fire, for itself and on behalf of American Home Assurance Company, Columbia Casualty Company, Commercial Union Insurance Company, Continental Insurance Company, The Home Insurance Company, The Insurance Company of the State of Pennsylvania, New England Reinsurance Company, and Transcontinental Insurance Company. CIGA filed a joinder in the cross-appellants' brief filed by U.S. Fire. Aerojet complains two insurers (American Home Assurance Company and the Insurance Company of the State of Pennsylvania) who joined the cross-appeal are not proper parties to the cross-appeal, because Aerojet dismissed its defense claims against their post-1970 policies before the court ruling which is the subject of the cross-appeal. However, the dismissal document cited by Aerojet specified it was dismissing "only" certain policies specified by policy number. Aerojet cites nothing showing no other policies of those insurers are at issue. In any event, we shall conclude the cross-appellants fail to meet their burden to show grounds for relief on their cross-appeal.

exhaustion of primary coverage. We shall affirm the judgment as modified.[4]

FACTUAL AND PROCEDURAL BACKGROUND

The operative pleadings in this appeal are Aerojet's First Amended Complaint (filed February 10, 1997) and First Supplemental Complaint (filed November 5, 1998).[5]

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[4] This appeal (C037097), which is an appeal from a final judgment, was consolidated in this court with Aerojet's earlier related appeal (C036514) from the trial court's order granting summary adjudication. Aerojet says it filed the first appeal as a precaution out of concern the order might be deemed an appealable judgment. Aerojet's concern and citation to a 1974 case is perplexing since, even if no issues remained for adjudication in the trial court, we made it clear in 1991 that the order granting the motion is not appealable; the order must be reduced to a judgment in order to be appealed. (*Modica v. Merin* (1991) 234 Cal.App.3d 1072.) Accordingly, we shall dismiss appeal C036514.

Nevertheless, Aerojet is entitled to challenge the summary adjudication ruling in Aerojet's appeal from the subsequent, appealable judgment. We therefore address Aerojet's contentions concerning the summary adjudication ruling.

[5] The judgment refers also to a second supplemental complaint, but we cannot find it in the record, nor is there any reference to it in the parties' appellate briefs. We see in the record a motion for leave to file a second *amended* complaint, but the trial court denied that motion. Aerojet mentions the denial of leave to amend but develops no assignment of error in that regard, and we therefore need not address it.

We also note Aerojet, which has the burden on appeal, has failed to provide adequate record citations for each factual or procedural reference in its appellate briefs, as was required at the time the briefs were filed by former rule 15 of the California Rules of Court; undesignated rule references are to the California Rules of Court. The requirement is retained in new rule 14, effective January 1, 2002.

Record citations are particularly important with a large record, such as this one. The joint appendix in C037097 purports to contain 7,426 pages, a substantial number in itself. However, it contains many more pages than that, because several

Aerojet's First Amended Complaint against the Excess Insurers and others (including primary insurers) sought a judicial declaration that each defendant had the duty to defend and indemnify Aerojet in connection with underlying governmental claims against Aerojet, instigated by the United States Environmental Protection Agency (EPA), asserting Aerojet's facility in Azusa, California, had released pollutants into the environment and contaminated area groundwater. Aerojet later withdrew its claim of a duty to *defend* the governmental action.

Aerojet's First Supplemental Complaint alleged defendants had a duty to defend and indemnify Aerojet in connection with several "toxic tort" lawsuits filed against Aerojet (and others) by individuals allegedly harmed by wellwater contamination.[6] Aerojet further alleged "Some of the Insurance Companies" had denied coverage and responsibility for defense costs of the toxic tort cases, and "other Insurance Companies have refused and failed to admit coverage or responsibility despite demand of Aerojet to do so."

In prior proceedings which were the subject of a separate appeal in this court (C035040), the trial court in August 1999

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pages in the joint appendix are actually made up of multiple pages. For example, page 948 is 621 pages long. It is numbered from 948.0000 to 948.0621. Page 1587 is 1109 pages long. It is numbered from 1587.0000 to 1587.1109.

Adding to our burden, the joint appendix's chronological index does not provide dates for all documents listed in the index, and some of the file-stamped dates on the documents in the joint appendix are illegible.

[6] Aerojet says the toxic tort cases are currently stayed.

granted summary adjudication in favor of some primary insurers on the ground that "pollution exclusions" in their insurance policies precluded a duty *to indemnify* Aerojet (which the insurers label "the Indemnity Ruling"). The trial court in that prior proceeding denied summary adjudication of the question of the duty *to defend*. The Indemnity Ruling became a judgment as to some, but not all, of the insurers when Aerojet dismissed its allegations of duty to defend as to some of the insurers. The Indemnity Ruling was the subject of a separate appeal in this court, C035040, in which we affirmed that judgment.

Aerojet's lawsuit continued in the trial court against (1) insurers whose policies did not contain pollution exclusions; (2) insurers who had obtained summary adjudication on the duty to indemnify based on pollution exclusions but remained in the case on the duty to defend; and (3) an insurer which provided environmental impairment insurance.

As against the Excess Insurers who are parties to this appeal, Aerojet pleaded causes of action for (1) declaratory relief with respect to the insurers' duty to defend Aerojet in the underlying claims; (2) declaratory relief with respect to the insurers' duty to indemnify Aerojet in the underlying claims; and (3) breach of contract for failure to pay Aerojet's defense costs.

In 1999, while this lawsuit was pending, Aerojet settled its coverage disputes with some of its primary insurers.

Around January 2000, various Excess Insurers filed or joined motions for summary adjudication of issues, arguing the

excess insurance could not be triggered because Aerojet could not show exhaustion of its primary insurance. The insurers also argued that because the Indemnity Ruling declared there was no coverage for the underlying claims against Aerojet, that ruling necessarily precluded a duty to defend.

Judge Ford, who took over this case upon retirement of the former trial judge, Judge Bond, denied the insurers' motion as to the latter ground, i.e., that the Indemnity Ruling precluded a duty to defend. This ruling (which the insurers label "the Defense Ruling") was incorporated into the eventual judgment and is the subject of cross-appeal in the instant appeal.[7]

With respect to the exhaustion issue, the trial court decided that instead of proceeding with the separate motions for summary adjudication, the court would decide whether lack of exhaustion of selected primary policies (which Aerojet claimed were exhausted by settlement) precluded the triggering of the Excess Insurers' duty to defend the underlying toxic tort cases.

In conformance with the trial court's directive, a motion for summary adjudication was filed by some Excess Insurers, and the court deemed all Excess Insurer defendants to have joined in the motion. The motion sought adjudication that the Excess Insurers have no duty to defend Aerojet in the underlying toxic

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[7] Although not made clear by the parties, it appears the "Defense Ruling" which is the subject of the cross-appeal would be limited to insurers whose policies had "pollution exclusions." It further appears that all the insurers who were parties to the "Defense Ruling" were also parties to the "Exhaustion Ruling" which is the subject of the instant appeal by Aerojet.

tort cases because a condition precedent to such a duty is that all underlying insurance must be exhausted, but there has been no exhaustion of specified primary insurance policies:

(1) Lloyd's of London primary policy for 1967-70 (LMI [London Market Insurers]), which Aerojet asserts had policy limits of $25,000 per occurrence and $25,000 aggregate, and

(2) the Transport Indemnity Company primary policy for 1973-76 (Transport), which Aerojet asserts had policy limits of $950,000 per occurrence, with a $950,000 aggregate limit for property damage and no aggregate limit for bodily injury.[8]

The defense motion asserted Aerojet's settlements with LMI and Transport were ineffective to establish exhaustion of the LMI and Transport primary policies under the "[a]ttachment of [l]iability" provisions of the excess policies, which provided:

"Liability to pay under this insurance shall not attach unless and until the Primary and Underlying Excess Insurers shall have admitted liability for the Primary and Underlying Excess Limits or unless and until [Aerojet] has by final judgment been adjudged to pay an amount which exceeds such Primary and Underlying Excess Limits and then only after the Primary and Underlying Excess Insurers have paid or have been held liable to pay the full amount of the Primary and Underlying Excess Limits."

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[8] For purposes of this appeal, we shall not need to resolve points raised by the parties as to the amount of policy limits of the LMI and Transport policies.

The settlements did not make any allocation between defense and indemnity costs, did not allocate amounts to any particular claims, and did not settle any underlying claims.[9] Rather, the settlements were what Aerojet characterizes as "[b]uy-back[s]" of the policies by the insurers by payment of money to Aerojet. Aerojet's July 1, 1999, Settlement Agreement with LMI (also captioned "Policy Buy-back") stated the parties intended the agreement to be a full and final settlement "that releases and terminates all rights, obligations and liabilities of [LMI] and Aerojet with respect to the Subject Insurance Policies" and "without [LMI's] admission of liability or responsibility under the Subject Insurance Policies." The agreement called for LMI to pay Aerojet $62,330,000, and for Aerojet to dismiss its claims against LMI and indemnify LMI from claims by other insurers of Aerojet. The LMI Settlement Agreement also provided it was "intended to be and is a compromise between the Parties and shall not be construed as an admission of coverage under the Subject Insurance Policies . . . ." The LMI Settlement also stated that upon Aerojet's receipt of the settlement payment Aerojet "agrees that it has exhausted the coverage of" the LMI policies, and "It is the intention of Aerojet to exhaust by this settlement the limits of those Subject Insurance Policies . . . . ."

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[9] On appeal, the Excess Insurers assert any amounts paid for defense costs could not count toward exhausting the policies, because defense costs are paid in addition to the policy limits.

Aerojet's Settlement Agreement with Transport (and other primary insurers collectively referred to as "Transport"), executed on September 17, 1999, required Transport to pay to Aerojet $26,655,000. A provision entitled "Full Policy Buy Back Release" stated that upon receipt of this money, Aerojet "agrees that it has exhausted the coverage of [Transport]. . . . [¶] It is the intention of Aerojet to exhaust by this settlement the limits of the Subject Insurance Policies that have heretofore been unexhausted, . . . [¶] Upon Aerojet's receipt of the Settlement Payment, any and all rights, duties, responsibilities and obligations of Transport created by or in connection with the Subject Insurance Policies are hereby terminated. As of the date of payment, Aerojet hereby has no insurance coverage under the Subject Insurance Policies." The agreement further stated "Transport has denied and continues to deny all substantive allegations and claims asserted against it in the Coverage Actions" and the parties "wish to fully and finally settle and resolve all claims and disputes . . . without the admission of liability or responsibility under the Subject Insurance Policies." The settlement further stated: "This Agreement is intended to be and is the result of a compromise between the parties hereto and shall never at any time or for any purpose be construed or considered as an admission of liability or of coverage under the Subject Insurance Policies."

The Excess Insurers' motion for summary adjudication said they had propounded interrogatories asking if Aerojet contended that the settlements constituted exhaustion of primary insurance

and, if so, to state all facts upon which that contention was based, to identify what underlying claims were paid, etc. Aerojet answered the interrogatories by stating that, for purposes of the duty to defend, specified (LMI and Transport) policies had been exhausted by settlement, and "[f]or purposes of the duty to indemnify, Aerojet objects on the ground that the interrogatory is irrelevant and premature. An excess policy must indemnify if a covered loss attributable to the policy period exceeds the policy limits of the underlying policies, whether or not the underlying insurers paid their policy limits. This being the case, there is no reason for Aerojet to have to make a contention one way or the other on this subject. Furthermore, as Judge Bond has already ruled, discovery pertaining to issues of offset, contribution, equitable indemnity and the like that may arise from the settlement with [LMI and Transport] are premature, and Aerojet therefore objects to this interrogatory on that basis. To the extent this interrogatory requests something more or different, Aerojet objects that it is vague and ambiguous and seeks irrelevancy. [¶] . . . Beyond that, pursuant to C.C.P. § 2030(f)(2), Aerojet refers to its settlement agreement with [LMI and Transport] and to the terms of the various excess CGL policies."

In response to interrogatories asking Aerojet to state what underlying claims had been paid in whole or part by any settlement amounts, Aerojet responded: "As stated [above], Aerojet is not required to make a contention on this subject for purposes of the duty to indemnify and accordingly does not do

so. As Judge Bond has already ruled, discovery pertaining to issues of offset, contribution, equitable indemnity and the like that may arise from the settlement with Lloyd's are premature, and Aerojet therefore objects to this interrogatory on that basis. Please refer to Aerojet's response to Interrogatory No. 1. To the extent this interrogatory requests something more or different, Aerojet objects that it is vague and ambiguous and seeks irrelevancy."

The Excess Insurers also submitted Aerojet's interrogatory answers (including some answers served a few months before the originally scheduled trial date) wherein Aerojet was asked to identify what occurrence(s) resulted in injury in the toxic tort suits, and Aerojet responded it could not say because no discovery had been conducted in the toxic tort suits (which had been stayed),[10] but any liability incurred by Aerojet would be covered. Aerojet earlier answered interrogatories concerning both the LMI and Transport settlements by stating in part: "To the extent [the] interrogatory is asking whether the settlement agreement allocated settlement proceeds to any particular occurrence or occurrences, the answer is that it did not. . . ."

We note the Excess Insurers filed a motion to compel further discovery responses at the same time they filed the motion for summary adjudication. The Excess Insurers argued California law required Aerojet to demonstrate that underlying

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[10] For purposes of this appeal, we accept as apparently undisputed that the toxic tort cases have been stayed.

insurance had been exhausted before any liability could attach to the excess insurance, and Aerojet had affirmatively refused to demonstrate that predicate by declining to answer interrogatories designed to ferret out that very information. It appears the court's ruling on the summary adjudication motion rendered it unnecessary to rule on the discovery motion.[11]

Aerojet filed a "MEMORANDUM RE: EXHAUSTION ISSUES," asserting the motion for summary adjudication was improper because the court had directed the parties merely to file briefs concerning the exhaustion issues. The trial court advised Aerojet that its view of the proceeding was incorrect and allowed Aerojet to file a late response to the Excess Insurers' separate statement of undisputed facts.

Aerojet asserted the settlements were intended to exhaust the LMI and Transport policies. Aerojet cited to the Settlement Agreements themselves, which as we have seen, stated only that *Aerojet* intended the settlements to exhaust the primary policies. Aerojet's opposition papers included argument not only concerning duty to defend, but also duty to indemnify.

Aerojet also argued "The single, overarching fact pertinent to the present analysis [exhaustion of primary insurance] is

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[11] In its opening brief on appeal, Aerojet presents no assignment of error with respect to the absence of a ruling on the discovery motion. Aerojet's discussion of this matter in its reply brief comes too late. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8 [reviewing court may disregard points which appellant could have and should have argued in its opening brief, but did not present until its reply brief].)

that Aerojet's liability in the underlying cases has not yet been determined. None of the cases have [*sic*] been fully resolved, either by final judgment or by settlement. All cases remain pending. Although Aerojet does seek to recover certain amounts of expense it has incurred to date, Aerojet's focus is to obtain a judicial declaration that insurers are obligated under their policies to provide indemnity for any future liability it may incur in the underlying cases."

In further opposition to the defense motion for summary adjudication, Aerojet asserted it is the "custom and practice in the insurance industry" to treat a primary insurer's settlement as an admission of liability for purposes of determining whether excess coverage is triggered, notwithstanding the settlement agreement's express disclaimer of liability. As evidentiary support, Aerojet submitted a declaration from an insurance "expert," David Frangiamore, attesting to the proposition. The Excess Insurers made evidentiary objections to the Frangiamore declaration. The trial court sustained the objections. As we discuss *post*, the trial court properly excluded the Frangiamore declaration from evidence.

On July 14, 2000, the trial court issued its written order granting the Excess Insurers' motion for summary adjudication on the ground they had no duty to defend because there had been no exhaustion of the primary insurance policies of LMI and Transport. The order rejected Aerojet's "self-serving statement" that payment of a substantial settlement constituted an admission of liability despite contract language to the

contrary. Aerojet's position that it could unilaterally declare its primary policies exhausted is contrary to California law.

The court order said there was no way to establish that any of the policies were exhausted. The Settlement Agreements showed that Aerojet received money from LMI and Transport in settlement of this case and other claims, but did not allocate the monies that were paid thereunder in any fashion.[12] The court said Aerojet had refused to provide discovery answers on critical points of (1) how many "occurrences" gave rise to the toxic tort cases; (2) when the occurrences happened; (3) how much damage was attributable to each occurrence or even to the toxic tort cases generally; (4) whether Aerojet contended there were aggregate limits in the underlying policies which applied to the toxic tort cases; (5) how Aerojet contends the settlement dollars it received should be allocated between (a) the various underlying claims, (b) the defense and indemnity obligations, and (c) the number of covered occurrences.

The court concluded the Excess Insurers were entitled to summary adjudication that they had no duty to defend Aerojet in the toxic tort cases. The court order continued: "Aerojet's counsel, on their own, invited the Court's application of its decision on the motion to the issue of indemnity and proceeded to argue that issue. The Court finds that for the same reasons-

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[12] The court noted, without ruling the evidence admissible, that Aerojet made a factual assertion that it had asked LMI to include in the Settlement Agreement an express allocation of $75,000 to a particular policy, but LMI refused.

-that Aerojet cannot show exhaustion of the underlying policies--the Excess Insurers can have no duty to indemnify Aerojet for the claims at issue in this case."

The trial court's order further stated "Aerojet was required to show that the Primary Policies were in fact exhausted. It did not do so, and, in the Court's view, can *never do so*." (Italics added.)

The trial court thus treated the motion as one for summary judgment and entered judgment in favor of the Excess Insurers and a separate judgment in favor of CIGA. Aerojet appeals from these judgments.

A notice of cross-appeal was filed by U.S. Fire, for itself and on behalf of American Home Assurance Company, Continental Insurance Company, Columbia Casualty Company, Commercial Union Insurance Company, The Home Insurance Company, The Insurance Company of the State of Pennsylvania, New England Reinsurance Company, and Transcontinental Insurance Company. These parties cross-appealed "from that part of the judgment denying the [defense] motions for summary adjudication that certain excess insurers have no prospective duty to defend based on the Court's earlier ruling that they have no duty to indemnify. . . ." The cross-appellant's brief was filed by U.S. Fire, with joinders filed by CIGA, Commercial Union, and Home Insurance Company.

DISCUSSION

I. Standard of Review

Summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled

to judgment as a matter of law concerning a cause of action. (Code Civ. Proc., § 437c, subd. (c).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established . . . ." (Code Civ. Proc., § 437c, subd. (o)(2); see also, *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843-857.) Once the moving party defendant meets its burden, the burden shifts to the plaintiff to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (o)(2).) On appeal, the reviewing court exercises its independent judgment, deciding whether under the undisputed facts, the opposing party's claim cannot be established or there is a complete defense. (*Aguilar, supra*, 25 Cal.4th at p. 860; *Villa v. McFerren* (1995) 35 Cal.App.4th 733, 741.)

II. Verbal Comments by Trial Court

We first dispose of Aerojet's argument that we should consider verbal comments made by the trial court indicating that part of the written order (prepared by the Excess Insurers and signed by the judge) was surplusage that exceeded the scope of the court's ruling. For reasons that follow, we shall not use the trial court's verbal statements to contradict the trial court's written order.

The general rule is that the judge's verbal comments do not provide a basis for reversal of a judgment, since verbal comments do not constitute the "decision" or judgment of the court. (E.g., *Bailey v. County of El Dorado* (1984) 162

Cal.App.3d 94, 97-98.) "Generally, oral opinions of the trial court may not be used to impeach the findings or judgment. [Citation.] While there are exceptions to this rule [citation], those exceptions involve situations in which the judge's statements as a whole disclose an incorrect rather than a correct concept of the relevant law, embodied not merely in secondary remarks but in his or her basic ruling. [Citations.] While oral statements may be used for the purpose of discovering the process by which the trial court arrived at its ultimate conclusion, they may not be used to impeach contrary written findings. [Citation.] One reason for this rule undoubtedly is that a judge may change his or her mind as to the meaning and weight of the evidence between the time an oral statement of opinion or belief is made in court and the time the judgment is signed and entered, and thus oral statements related to the judge's belief or opinion as to evidentiary matters should not be given greater weight than the judgment, which is a manifestation of the trier of fact's *final* opinion or belief as to the evidence." (*Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1385-1386.)

Aerojet cites authority for the proposition that the trial court's verbal comments may be used on appeal to "interpret" a judgment. (*Coakley v. Ajuria* (1930) 209 Cal. 745, 749; *In re Estate of Felton* (1917) 176 Cal. 663, 667.) However, the latter case involved a *written* opinion, not verbal comments, and is therefore inapposite. *Coakley* said "the learned trial judge took an erroneous view of the law applicable to the facts, as is

made apparent from an oral opinion which he delivered directing the order of nonsuit. While the reasons of a trial court so given do not in a strict sense constitute a part of the record on appeal, yet, where they furnish, as in this case, the basis of the court's action, and really constitute the only grounds upon which the judgment may be affirmed, it is proper to give them special consideration." (*Coakley, supra*, 209 Cal. at p. 749.)

Coakley is inapposite because it did not involve a written ruling that was subject to reversal by the court's oral comments. Moreover, in the case before us, Aerojet fails to show the trial court's verbal comments reflect an erroneous view of the law on a matter that constitutes the sole ground upon which the judgment may be affirmed.

In sum, we shall not use the trial court's oral comments to contradict the written order that it entered. (*Tract Development Services, Inc. v. Kepler, supra,* 199 Cal.App.3d at p. 1386.)

III. General Legal Principles Re: Excess Insurance

Excess insurance means "insurance that begins only after a predetermined amount of underlying [primary] coverage is exhausted and that does not broaden the underlying coverage." (*Wells Fargo Bank v. California Ins. Guarantee Assn.* (1995) 38 Cal.App.4th 936, 940, fn. 2.) As with other insurance, each insurer's defense and indemnification obligations, if any, depend on the terms and conditions of the policy of each.

(*Hartford Accident & Indemnity Co. v. Superior Court* (1994) 29 Cal.App.4th 435, 441.)

Where, as here, excess policies are not triggered until exhaustion of primary policies, the excess insurers' coverage obligations, if any, do not arise until *all* underlying policies have been exhausted. (*Olympic Ins. Co. v. Employers Surplus Lines Ins. Co*. (1981) 126 Cal.App.3d 593, 600.) "[L]iability under a secondary policy will not attach until all primary insurance is exhausted, even if the total amount of primary insurance exceeds the amount contemplated in the secondary policy." (*Ibid*.) "The fact that the total amount of primary insurance covering the loss exceeds the amount contemplated in the excess policy does not subject the excess carrier to liability. 'Liability under a secondary [excess] policy will not attach until all primary insurance is exhausted, even if the total amount of primary insurance exceeds the amount contemplated in the secondary policy.' [Citations.]" (*Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1850.)

Exhaustion applies to both the duty to defend *and* the duty to indemnify. Thus, unless the excess policy provides otherwise, the primary insurer has the exclusive duty to defend the insured against third party claims until the primary coverage is exhausted or otherwise not on the risk. (See *Ticor Title Ins. Co. v. Employers Ins. of Wausau* (1995) 40 Cal.App.4th 1699, 1707; *Community Redevelopment Agency v. Aetna Casualty & Surety Co*. (1996) 50 Cal.App.4th 329, 339-340; 2 Croskey et al.,

Cal. Practice Guide: Insurance Litigation (The Rutter Group 2001) ¶ 8:106, p. 8-41.) The excess insurer has no duty to defend or indemnify until all the underlying policies are exhausted. (*Community Redevelopment Agency, supra*, 50 Cal.App.4th at pp. 339-341.) The excess insurer is obligated to pay for defense costs after the primary coverage is exhausted. (*Hartford Accident & Indemnity Co. v. Superior Court* (1994) 23 Cal.App.4th 1774, 1780; 2 Croskey et al., *supra*, ¶ 8:112, p. 8-43.)

To trigger excess coverage, the policy limit of the primary insurance normally must be paid pursuant to settlement or judgment against the insured. (2 Croskey et al, *supra*, ¶ 8:87, pp. 8-34 to 8-35, citing *County of Santa Clara v. USF & G* (N.D.Cal. 1994) 868 F.Supp. 274, 277 [primary insurer tendered its policy limits to insured in response to a "Remedial Action Order" issued by an environmental protection agency; under California law this was *not* a valid exhaustion of primary coverage] and *Chubb/Pacific Indemnity Group v. Insurance Co. of North America* (1987) 188 Cal.App.3d 691, 698 [primary insurer's attempt to cede its policy limits to excess insurer did not constitute exhaustion of primary insurance].)

IV. Claim of Evidentiary Error

Aerojet contends the trial court erred in excluding its expert's declaration that the custom and practice in the insurance industry is for excess insurers to consider excess coverage triggered when a primary insurer settles or buys back its policy from the insured, notwithstanding that the excess

policies require an admission of liability by the primary insurer and the settlement agreement disclaims liability. We shall conclude the trial court properly excluded the declaration.

Aerojet submitted a declaration from an insurance "expert," David Frangiamore, who attested on June 15, 2000: "It is the custom and practice in the insurance industry to treat a primary or underlying insurer's policy buyback for purposes of determining whether an excess insurer must provide coverage for a claim in excess of the underlying carrier's policy limits as a situation where that underlying insurer has 'admitted liability' for the contracted indemnity up to its policy limits within the first clause of the 'Attachment of Liability' provision quoted above.[13] In other words, it is commonly accepted within the insurance industry that the 'admitted liability' clause is satisfied by a primary insurer's payment pursuant to a policy buyback, and that such settlement includes some negotiated discount from what the insured believes is a full policy limits payment. In this instance the policyholder generally assumes liability for any claimed difference between the amount paid by

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13 The quoted provision stated: "Liability to pay under this insurance shall not attach unless and until the Primary and Underlying Excess Insurers shall have admitted liability for the Primary and Underlying Excess Limits or unless and until the Assured has by final judgment been adjudged to pay an amount which exceeds such Primary and Underlying Excess Limits and then only after the Primary and Underlying Excess Insurers have paid or have been held liable to pay the full amount of the Primary and Underlying Excess Limits."

the primary insurer and stated policy limits. [¶] . . . [A]s a practical matter, excess insurers and the industry generally treat a primary insurer's buyback as an 'admission of liability,' notwithstanding the fact that settlement documentation may contain boilerplate language of the kind found in virtually all settlements in virtually all contexts, stating that the insurer does not admit liability. Such settlement language is not deemed to be material by the industry for purposes of determining whether an excess insurer must provide coverage and does not alter my conclusion on this point."

The Excess Insurers made evidentiary objections, sustained by the trial court, on various grounds, including lack of foundation and violation of the parol evidence rule.

We shall conclude the trial court properly excluded the evidence for lack of foundation, and we therefore need not address the other grounds.

At issue here is the meaning of the phrase "admitted liability" in the excess insurance contracts between Aerojet (the insured) and Excess Insurers, whereby the excess insurance is not triggered "unless and until the Primary . . . Insurers shall have admitted liability for the Primary . . . [l]imits . . . ."

The LMI and Transport Settlement Agreements expressly stated there was *no* admission of liability.

Aerojet argues its expert declaration was admissible to explain that it is the custom and practice *in the insurance industry* to construe "admitted liability" in attachment-of-

excess-liability provisions to include settlements or "buybacks" between the primary insurer and the insured, despite the fact that such settlement agreements typically include an express disclaimer of liability.

We shall conclude Aerojet's position lacks merit. As we shall explain, the insurance contracts are to be interpreted *as of the time they were entered into*. The most recent insurance policy at issue was issued in 1985. Aerojet's expert rendered an opinion as to custom and usage in the industry as of 2000. The trial court properly sustained an objection that the expert's opinion lacked foundation to testify as to custom and usage in 1985 or earlier.

"Insurance policies are contracts and therefore subject to the rules of construction governing contracts. [Citation.] The goal of contractual interpretation is to determine and give effect to the mutual intention of the parties. [Citations.]" (*Safeco Ins. Co. v. Robert S*. (2001) 26 Cal.4th 758, 762-763.)

"Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.)[**14**] Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*., § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their

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14 Civil Code section 1636 provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644[15]), controls judicial interpretation. (*Id.*, § 1638.[16]) Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations.]

"If there is ambiguity, however, it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation. (Civ. Code, § 1649.) If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. (*Id.*, § 1654.) In the insurance context, we generally resolve ambiguities in favor of coverage. [Citations.] Similarly, we generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured. [Fn. omitted.] [Citations.] These rules stem from the fact that the insurer typically drafts policy language, leaving the insured little or no meaningful opportunity or

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15 Civil Code section 1644 provides in part: "[W]ords of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

16 Civil Code section 1638 provides: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

ability to bargain for modifications. [Citations.]" (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.)

Extrinsic evidence regarding an insurer's intention is generally inadmissible to vary *clear and explicit* contract provisions. (*Commerce & Industry Ins. Co. v. Chubb Custom Ins. Co*. (1999) 75 Cal.App.4th 739, 746; 2 Croskey et al., *supra*, ¶ 8:79, p. 8-32.2.)

"The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.]" (*Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co*. (1968) 69 Cal.2d 33, 37; see also, Code Civ. Proc., § 1856, subd. (g) [allowing evidence of the circumstances under which the agreement was made or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement].)

"The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the contract. [Citation.]

". . . The trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is reasonably susceptible) is a question of law, not of fact. [Citation.] Thus the threshold determination of ambiguity is subject to independent review. [Citation.]" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165-1166.) The second step--the ultimate construction placed upon the ambiguous language--may call for differing standards of review, depending upon the parol evidence used to construe the contract. (*Ibid*.)

Here, the ordinary sense of the contractual provision in this case (requiring the primary insurer to "admit liability" in order to trigger the excess policy) is that a primary insurer does not "admit liability" when it enters a settlement agreement which expressly states it does *not* admit liability. Indeed, Aerojet's proposed construction is *inconsistent* with the language of the contract.

Aerojet argues parol evidence was admissible to construe the contract. Though not cited by the parties, Aerojet's argument implicates Code of Civil Procedure section 1856, subdivision (c), which provides "The terms set forth in a writing [intended by the parties as a final expression of their agreement] may be explained or supplemented by course of dealing or usage of trade or by course of performance."

On appeal, Aerojet argues Frangiamore's declaration was admissible to show trade usage, because evidence of custom and usage is *always* admissible, even where the contract language

appears unambiguous on its face. Assuming for the sake of argument that evidence of trade usage was admissible, the evidence of trade usage set the forth in Frangiamore's declaration was inadmissible because he did not testify as to trade usage when the contracts of insurance were entered into.

As our Supreme Court said in *AIU Ins. Co. v. Superior Court, supra,* 51 Cal.3d at page 821, it is the mutual intention of the parties *at the time the contract is formed* that governs its interpretation. (See also Civ. Code, § 1636, fn. 14 *ante*; *Borg v. Transamerica Ins. Co.* (1996) 47 Cal.App.4th 448, 456; *Legarra v. Federated Mutual Ins. Co.* (1995) 35 Cal.App.4th 1472, 1485.)

Here, the most recent insurance contract at issue was entered into in 1985. The vast majority of policies were entered into before 1976. Yet Aerojet's expert testified as to *current* customs and practices in the insurance industry as of the date of his declaration, June 15, 2000. The expert first started working in the insurance industry in 1991. In the absence of preliminary showings that (a) the expert was knowledgeable about customs and practices in the industry in years 1985 and earlier, when the insurance contracts were entered into and (b) the customs and practices he described were in effect in 1985 and earlier, the trial court properly sustained the insurers' objection for lack of foundation. (See Evid. Code, § 403, subd. (a)(1).) The trial court correctly determined that evidence of custom and usage in the year 2000 was too weak to allow a jury to determine custom and usage in

years 1985 and before. (See *People v. Lucas* (1995) 12 Cal.4th 415, 466.)

In light of this conclusion, we have no occasion to determine whether evidence of trade usage is admissible where both parties to a contract are not members of the trade. (But see *Ermolieff v. R.K.O. Radio Pictures* (1942) 19 Cal.2d 543, 550.)

We conclude there was no evidentiary error, and the trial court properly excluded the Frangiamore declaration.

V. Exhaustion of Primary Insurance

Aerojet contends the trial court erred in concluding it lacked the authority to issue the declarations needed to trigger the excess policies. We shall conclude the trial court properly determined Aerojet had failed to show exhaustion of primary insurance and therefore the excess insurance was not triggered. We shall further conclude, however, the trial court erred in stating that Aerojet will *never* be able to show exhaustion in the future.

A. The Settlements Did Not Constitute Exhaustion

Aerojet argues the trial court erred in determining that the LMI and Transport settlements did not constitute exhaustion of those primary policies. We disagree.

As indicated, the policy language at issue in this appeal is as follows: "Liability to pay under this [excess] insurance shall not attach unless and until the Primary and Underlying Excess Insurers shall have admitted liability for the Primary and Underlying Excess Limits or unless and until [Aerojet] has

by final judgment been adjudged to pay an amount which exceeds such Primary and Underlying Excess Limits and then only after the Primary and Underlying Excess Insurers have paid or have been held liable to pay the full amount of the Primary and Underlying Excess Limits."

Aerojet says this provision can be read in two ways. One way is that the conditions after the words "and then only after" (i.e., primary insurers have paid or been held liable to pay) apply to both antecedent phrases--admission of liability by primary insurer, and final judgment against Aerojet. The other way is that the conditions after the words "and then only after" apply only to the latter phrase--final judgment against Aerojet. Aerojet says it can satisfy either construction. We need not decide whether the conditions apply to the first phrase (admission of liability), because there was no admission of liability by the primary insurers in this case.

Thus, LMI and Transport did not admit liability; to the contrary, the Settlement Agreements expressly stated there was no admission of liability.

Aerojet cites *Johnson v. Continental Ins. Companies* (1988) 202 Cal.App.3d 477, for the proposition that where a primary insurer pays its policy limits with the consent of the policyholder toward settlement of an underlying claim, the payment exhausts the primary policy. However, *Johnson* did not involve any excess insurer; it held an insurer who paid policy limits to settle claims of injured passengers had no duty to defend the insured-driver against cross-complaints filed as a

result of the driver's products liability action against others. (*Id*. at p. 486.) Moreover, unlike the settlement in *Johnson*, the LMI and Transport settlement agreements at issue in this appeal did not provide for payments to any underlying claimants, but rather to Aerojet, and did not relate payments to any compromise of any particular underlying claim. Rather, as characterized by Aerojet, the primary insurers "[bought] back" their policies from Aerojet.

Aerojet discusses no legal authority concerning the effect of a "[b]uy back" on the question of exhaustion. Aerojet merely asserts that, since each insurance policy is a contract between the insured and issuing insurer only, those parties can terminate their contractual relationship as they see fit. However, Aerojet fails to show the primary insurers' "[b]uy back" constitutes exhaustion under the excess insurance contract.

Aerojet cites cases applying law from other states for the proposition that the avoidance of the duty to defend is dependent upon whether a judgment or settlement has been reached with the injured party "or the permission of the insured has been obtained to forego the duty to defend." (*Viking Ins. Co. of Wisconsin v. Hill* (Wash.App. 1990) 787 P.2d 1385, 1389-1390, italics omitted; *M.H. Detrick Co. v. Century Indem. Co*. (Ill.App. 1998) 701 N.E.2d 156.)

However, this appeal is to be decided under California law, and under California law, "the primary insurer cannot extinguish its defense obligation simply by tendering its indemnity limits

to the insured and walking away from the fray," even if the insured consents. (*County of Santa Clara v. USF &* G, *supra*, 868 F.Supp. 274, 277 [applying California law].) *County of Santa Clara* said the primary insurer "cannot valid[l]y extinguish its defense obligation by merely tendering its . . . indemnity limits to [its insured]. And it is equally clear that the [insured's] acceptance of the indemnity limits and acquiescence in [the primary insurer's] departure does not make a difference vis a vis [the umbrella policy insurer's] obligations. Under the [umbrella] policy and California insurance law, in order to constitute a valid exhaustion of primary coverage which triggers [umbrella] coverage, the payment must be made to satisfy an obligation arising out of either an adjudication or a compromise of a third party claim. Payment of the policy limits directly to the [insured] in the absence of liability to a third party does not meet this condition." (*Id*. at p. 278.)

Though the parties to this appeal do not mention *County of Santa Clara, supra*, 868 F.Supp. 274, and though the case is not binding on this court, we note factual similarities with this case. There, the insured County was subjected to a state "Remedial Action Order" (RAO) to clean up mercury contamination. The County and its primary insurer entered into an agreement pursuant to which the primary insurer agreed to pay the County $75,000 to settle bad faith claims and $150,000 for defense costs. The insurer also agreed to deposit an additional $500,000 into escrow for the County, an amount calculated to represent the primary carrier's maximum potential property

damage obligation and total liability coverage under the policy. The escrow was to be released to the insured upon a judicial determination that the primary insurer's obligations were thereby exhausted, and the umbrella policy was triggered. (*Id*. at p. 276.) The federal district court held the primary insurer could not pay out its indemnity limits and thereby extinguish its duty to defend until a remediation plan was approved. The mere issuance of the RAO was insufficient to trigger coverage under the excess policy. (*Id*. at p. 279.) The approval of a remediation plan would be the functional equivalent of a final adjudication of liability sufficient to exhaust primary indemnity limits and trigger the umbrella policy carrier's defense obligation. (*Ibid*.)

Here, as in *County of Santa Clara*, it is contended that primary insurance was exhausted for purposes of the excess insurance contracts by settlement between the primary insurer and the insured. However, exhaustion was not shown.

We conclude the Settlement Agreements did not constitute "admissions of liability" exhausting the primary insurance.

Because the record before the trial court showed without material factual dispute that Aerojet had not exhausted its primary insurance policies for purposes of the excess insurance contracts, the trial court correctly determined that the Excess Insurers had no present duty to defend or indemnify Aerojet. (*County of Santa Clara v. USF & G, supra,* 868 F.Supp. at p. 277; *Community Redevelopment Agency v. Aetna Cas. & Sur. Co., supra,* 50 Cal.App.4th at pp. 349-340; *Ticor Title Ins. Co. v. Employers*

Ins of Wausau, supra, 40 Cal.App.4th at p. 1707; *Hartford Acc. & Indemn. Co. v. Superior Court, supra,* 23 Cal.App.4th at p. 1780; 2 Croskey et al., *supra*, ¶ 8:106, p. 8-41.)

B. Future Exhaustion

Aerojet challenges the comment in the trial court's written order that Aerojet will *never* be able to show exhaustion.[17] Aerojet complains the trial court erred in prematurely and permanently extinguishing Aerojet's right to seek billions of dollars in excess coverage.[18] We agree.

As indicated, the attachment-of-liability provisions in the excess policies provided an alternative method for exhausting primary insurance, i.e., where Aerojet "has by final judgment been adjudged to pay an amount which exceeds such [primary insurance] and then only after the [primary insurers] have paid or have been held liable to pay the full amount of the [primary] Limits."

This alternative method has not been satisfied in this case, because there is no final judgment ordering Aerojet to pay money.

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[17] The court order stated "Aerojet was required to show that the Primary Policies were in fact exhausted. It did not do so, *and, in the Court's view, can never do so*." (Italics added.)

[18] Aerojet says the judgment in this case not only encompasses the underlying claims which are currently pending, but also has the effect of barring Aerojet from receiving any excess insurance in connection with any future claims that may ever be brought against Aerojet. We do not express any opinion concerning future claims.

Aerojet contends it is “a given” that eventually there will be a final judgment against Aerojet in the underlying claims, ordering it to pay an amount which exceeds the primary policy limits, and perhaps Aerojet will be able to show in the future that the primary insurers “have paid” in settlement amounts which exceeded the primary policy limits (depending on what a trier of fact finds concerning single versus multiple occurrences, etc.).

The Excess Insurers have furnished us with no reason to conclude at this point that Aerojet will *never* be able to show exhaustion in the future, for example, if judgments are ultimately entered against Aerojet in the stayed toxic tort suits.

The Excess Insurers cite no case law holding that the Excess Insurers would have no liability under their policies if judgment was entered against Aerojet in the toxic tort cases. Rather, the Excess Insurers argue that even if a judgment is ultimately entered against Aerojet in the toxic tort cases, it is not a “given” that the amount of the judgment will exceed the primary policy limits, because “[w]hether that could ever happen is in part a function of the amount of Aerojet’s adjudicated liability, the number of occurrences and when they took place--without those predicates, the underlying limits are only a matter of speculation--the more occurrences, the more limits applicable. . . .”

This comment merely illustrates it is premature at this point to say Aerojet will never be able to show exhaustion.

Having acknowledged these matters will not be known until trial of the underlying cases, the Excess Insurers claim "Aerojet made its bed by its stubborn refusal to answer interrogatories directed to these issues." However, the Excess Insurers have just acknowledged these answers must await trial. To the extent the Excess Insurers mean to complain that Aerojet failed to state its *theory* on these issues, they fail to show that such discovery failure will necessarily preclude presentation of these issues at a trial in the underlying toxic tort cases.

The Excess Insurers further argue that, even if a judgment exceeding primary policy limits is entered against Aerojet, Aerojet can never meet the final requirement of the attachment-of-liability clause--to show that the primary insurers "have paid" or "been held liable to pay" their full policy limits. We need not address the latter because discussion of the "have paid" language suffices for resolution of this appeal. Thus, the Excess Insurers argue "Aerojet itself made it impossible to determine that [LMI] and Transport have paid the full amount of their limits or any portion thereof. The settlement agreement does not show that; and Aerojet refuses to answer interrogatories about that very matter."

However, the Excess Insurers cite no authority for the proposition that if a settlement agreement between an insured and a primary carrier does not expressly allocate and identify amounts paid to the insured, that the insured is forever barred from proving that, in fact, the payment by the primary carrier

exceeded its policy limits. Here, for example, the primary LMI policy, in effect between 1967 and 1970, had policy limits of $25,000 per occurrence and $25,000 aggregate. Yet LMI paid Aerojet more than $62 million in settlement. Similarly, the primary Transport policy, in effect between 1973 and 1976, had policy limits of $950,000 per occurrence and $950,000 aggregate. Yet Transport paid Aerojet more than $26 million in settlement. The vast disparity between the policy limits and the amounts paid in settlement facially suggests the possibility that the settlement payments did, in fact, exhaust the policy limits. We have been cited no law holding that Aerojet should not be able to prove that these payments by the primary insurers were, in fact, in excess of the primary policy limits in the event that judgment is entered against Aerojet in the toxic tort cases. And, so far as Aerojet's unwillingness to answer interrogatories on this issue is concerned, we think that Aerojet's basic position--that the information was not now available but had to await resolution of the toxic tort cases--was sound.

Thus, it is premature at this juncture to conclude that Aerojet will *never* be able to show (1) a final judgment adjudging it to pay an amount which exceeds the primary insurance and (2) that the primary insurers have paid the full amount of their policy limits

We therefore conclude the trial court erred in stating that Aerojet will *never* be able to show exhaustion.

Contrary to Aerojet's position, however, this does not mean the judgment must be reversed. At this juncture, any future

claims are premature, but the trial court properly adjudicated the present obligations of the excess carriers and properly concluded there was no present duty.

Though not cited by the parties on appeal, we note the trial court in its written order cited (without discussion) *Iolab Corp. v. Seaboard Surety Co*. (9th Cir. 1994) 15 F.3d 1500, which has something to say on this matter. In *Iolab*, which applied California law (*id*. at p. 1505), an insured filed a breach of contract suit against its primary and excess insurers, alleging coverage for an underlying claim. The excess policies provided that their liability did not attach until the underlying insurers had paid or been held liable to pay their policy limits. (*Id*. at p. 1503.) The trial court dismissed on the pleadings as to some insurers and granted summary judgment to other insurers. The insured appealed. The excess insurers argued that, (1) even assuming the excess policies would be triggered by the underlying loss, the insured was required to exhaust primary coverage before requesting payment from the excess insurers and (2) the excess policies would never be triggered because the total amount of the loss was below the aggregate primary coverage. (*Id*. at p. 1504.) The insured argued it should be allowed to sue all insurers in order to make a comprehensive determination of coverage, and requiring it to litigate one layer of insurance at a time would be wasteful. (*Ibid*.) The insured further argued that, even if it could not proceed with its breach of contract claim, the district court

sua sponte should have treated the insured's claim as an action for declaratory judgment. (*Ibid*.)

The Ninth Circuit first concluded that, under California law, the insured could not sue the excess insurers for breach of contract until the legal obligations of the primary insurers had been determined and the excess policies triggered. (*Iolab, supra*, 15 F.3d at p. 1504.)

The Ninth Circuit then rejected the argument that the case should have been treated as one for declaratory relief, stating that federal courts applying California law have rejected the proposition that the excess insurer should be obligated to participate immediately in the defense once it has notice that the underlying claim might invade excess coverage and the amount of potential exposure is reasonably ascertainable. (*Iolab, supra*, 15 F.3d at pp. 1504-1505.) Requiring the excess insurer to join the defense would require the excess insurer to contribute to defense costs even though excess liability might never attach and despite explicit provisions of the excess policy. (*Id*. at p. 1504 [citing California law].) The policy behind avoiding imposition of unnecessary litigation costs on excess insurers applies to breach of contract claims and declaratory relief actions alike. (*Id*. at p. 1505.) The insured had not established that the underlying loss would ever trigger excess coverage, and the excess insurers were properly dismissed from the case. (*Ibid*.)

The same principle applies in this case. Aerojet sued primary and excess insurers together in a lawsuit seeking both

declaratory relief and breach of contract damages. Aerojet's lawsuit alleged an actual controversy existed regarding the duty to defend, but Aerojet's lawsuit sued primary and excess insurers together. This appeal involves only the excess insurers, and we have explained in this opinion that the Excess Insurers do not owe a duty to indemnify or defend until exhaustion of the primary insurance, and there has been no exhaustion of the primary insurance.

Iolab was cited with approval by *Community Redevelopment Agency*, *supra*, 50 Cal.App.4th at p. 339, in support of the proposition that "It is settled under California law that an excess or secondary policy does not cover a loss, nor does any duty to defend the insured arise, until *all* of the primary insurance has been exhausted. [Citation.]"

Though not cited by the parties on appeal, we note *Ludgate Insurance Co. v. Lockheed Martin Corp*. (2000) 82 Cal.App.4th 592, said that exhaustion of underlying limits, while necessary to entitle the insured to recover on the excess policy, is not necessary to create an "actual controversy" for purposes of obtaining declaratory relief under Code of Civil Procedure section 1060. (*Ludgate, supra*, 82 Cal.App.4th at p. 606.) However, that case was a judgment on the pleadings, and the court specifically distinguished itself from *Iolab* on that basis, that *Iolab* involved a summary judgment rather than a motion for judgment on the pleadings. (*Ludgate, supra*, 82 Cal.App.4th at pp. 609-610.)

We agree with *Iolab, supra*, 15 F.3d 1500, and we conclude that it is premature to say whether or not Aerojet will ever be able to show exhaustion under the alternate method afforded by the attachment-of-liability provisions, i.e., that Aerojet has by final judgment been adjudged to pay an amount which exceeds the primary insurance and then only after the primary insurers have paid or been held liable to pay the full amount of their policy limits.[19]

We shall therefore modify the judgment (Code Civ. Proc., § 906), as set forth in our Disposition, *post*, by striking from the trial court's order the words "and, in the Court's view, can never do so," and by modifying the judgment to read the insurers have no "present" duty to defend or indemnify.

As modified, Aerojet fails to show grounds for reversal of the judgment.

VI. Claim of Unresolved Issues

Aerojet contends the judgment must be reversed because the trial court erroneously applied a "one-size-fits-all" approach, extending its core holding drawn from selected policies (the 1967-70 LMI property damage policy and the 1973-76 Transport bodily injury and property damage policy) to *all* excess insurance, even policies with different language for different

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[19] We have no occasion to decide and do not decide whether the Excess Insurers will ever have an obligation to Aerojet in connection with the underlying claims. We merely hold such a possibility is not foreclosed on this record in this appeal.

policy years and unrelated coverage situations. We shall conclude Aerojet fails to show grounds for reversal.

All primary insurance must be exhausted before excess insurance will be triggered. (*Stonewall Ins. Co., supra*, 46 Cal.App.4th at p. 1850; *Olympic Ins. Co., supra*, 126 Cal.App.3d at p. 600.) The trial court in its written order determined exhaustion had not been shown with respect to the LMI and Transport primary policies. Our rejection of Aerojet's challenge to this holding, *ante*, should end the matter, since the inability to show exhaustion of any primary policy precludes the triggering of the excess policies. However, Aerojet argues that rule applies to horizontal exhaustion (a loss triggering multiple policy years must exhaust the primary limits in all of the triggered years before the insured can reach the excess coverage), and such a rule presupposes that the occurrence(s) triggered multiple policy years--a matter which will not be known until trial. Aerojet argues the proper approach is vertical exhaustion, i.e., where a continuing loss triggers multiple policy periods, the policyholder should be able to pick whichever year it wishes, access all coverage available in that year, and then do likewise in other years. We need not address the horizontal-versus-vertical dispute, because we shall address Aerojet's contentions concerning "one-size-fits-all," and we shall conclude Aerojet's contentions have no merit.

A. The 1958-61 Excess Policies

Aerojet first argues the policy language interpreted by the court differed from the "[a]ttachment of [l]iability" provision

in Aerojet's 1958-61 excess policies, typified by the following provision in Continental Casualty Policy Number RD9970629:

"Liability under this Policy shall not attach unless and until the Underlying Insurers shall have admitted liability for the Underlying Limit or Limits, or unless and until the Assured has by final judgment been adjudged to pay a sum which exceeds such Underlying Limit or Limits."

However, Aerojet fails to acknowledge the Continental policy further provided: "PROVIDED ALWAYS THAT it is expressly agreed that liability shall attach to Underwriters only after the insurer/s under the underlying policy/ies (hereinafter called the 'Underlying Insurers') have paid or have been held liable to pay the full amount of their respective ultimate net loss liability . . . ."

Thus, the language in the 1958-61 policies did not differ materially from the language construed by the trial court.

We conclude Aerojet fails to show grounds for reversal with respect to the 1958-61 policies.

B. The 1976-85 Excess Policies

Aerojet contends first-level excess policies for 1976-85 do not contain "[a]ttachment of [l]iability" provisions, but contain other provisions dictating when they are triggered, and these other provisions are materially different from the language analyzed by the trial court. Aerojet cites as representative the 1976-77 Continental policy, pursuant to which Continental agreed "to pay, on behalf of the insured the ultimate net loss, in excess of the applicable underlying or

retained limit, which the insured shall become legally obligated to pay as damages because of (A) Personal Injury, (B) Property Damage, or (C) Advertising Injury to which this policy applied, caused by an occurrence." The policy defines "ultimate net loss" as "the sum actually paid or payable in cash in the settlement or satisfaction of losses for which the insured is liable. . . ."

Aerojet argues this provision imposes no requirement for the primary insurer to have paid or been held liable to pay or to have admitted liability.

However, Aerojet again omits further provisions of the cited policy. Thus, the cited Continental policy further provides "the company's liability shall be only for the ultimate net loss in excess of: (a) the underlying limits of liability of the underlying insurance policies as stated and described in the declarations and *those of any underlying insurance collectible* by the insured as to each occurrence insured by said underlying policies of insurance. . . ." (Italics added.)

Substantially similar language has already been construed to require exhaustion of all underlying horizontal insurance before any liability attaches to the excess policy. (*Community Redevelopment Agency, supra*, 50 Cal.App.4th at pp. 335, 341.) The language in the *Community Redevelopment* case provided: "The Company shall be liable only for the ULTIMATE NET LOSS in excess of the greater of the INSURED'S: (A) Underlying Limit--An amount equal to the Limits of Liability indicated beside the underlying insurance listed in the Schedule of Underlying

Insurance (Schedule A), *plus the applicable limits of any other underlying insurance collectible by the* INSURED . . . ." (*Id.* at p. 335, fn. omitted.)

Moreover, the Continental policy cited by Aerojet further provided: "Loss Payable-Action Against Company. No action shall lie against the company with respect to any one occurrence unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay an amount of ultimate net loss in excess of the underlying or retained limit shall have been finally determined either by *judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company*." (Italics added.)

In its reply brief, Aerojet asserts the language in the Continental policy is not substantially similar to the language in the *Community Redevelopment* case. We disagree. Aerojet further argues *Community Redevelopment* is distinguishable because it addressed only the duty to defend, and the policy there contained other language obligating the excess insurer to defend, provided no other insurance affording a defense or indemnity was available, and the court there relied on that language in finding the excess insurer did not have a duty to drop down and defend the policyholder. None of this argument defeats the point for which *Community Redevelopment* is cited.

We conclude Aerojet fails to show grounds for reversal with respect to the 1976-85 policies.

C. The Fidelity & Casualty Primary Policies

Aerojet complains the trial court's ruling cannot extend to excess policies above Fidelity & Casualty (F&C) primary policies, because F&C has not settled (and is in fact providing a partial defense to Aerojet in the underlying suits). However, the fact that F&C has not settled works *against* Aerojet. There is no F&C settlement upon which Aerojet could base an argument that the F&C primary policies have been exhausted, thereby triggering excess insurance.

Aerojet argues that results at trial in the underlying cases against Aerojet may result in exhaustion of the F&C policies and triggering of the excess policies. However, Aerojet fails to show how that potential future event entitles Aerojet to a judicial declaration now.

Under this same subheading, Aerojet says it was improper for the trial court to extend its ruling to policies providing excess *bodily injury* coverage. However, Aerojet fails to explain its point in its opening brief and has therefore waived it. Its attempt to develop the point in its reply brief comes too late. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

We conclude Aerojet fails to show grounds for reversal based on the F&C policies.

D. The 1970-73 Argonaut Primary Policy

Aerojet argues the trial court's ruling cannot be extended to excess policies above Argonaut's 1970-72 primary policy, because by the trial court's own reasoning Argonaut's settlement

with Aerojet exhausted its primary coverage, because the Argonaut settlement expressly allocated the settlement payment between indemnity and defense obligations, which according to Aerojet was the very "magic language" the trial court found lacking in the settlements it examined. However, the fact that Argonaut's settlement agreement allocated between defense and indemnity did not mean the policy limits were exhausted. Aerojet fails to show the Argonaut policy was exhausted. Aerojet's attempt to do so in its reply brief comes too late. (*Neighbours v. Buzz Oates Enterprises, supra,* 217 Cal.App.3d at p. 335, fn. 8.)

E. Self-Insured Retentions

Aerojet argues the trial court's ruling cannot be extended to excess policies that are excess to "self-insured retentions." We shall conclude Aerojet fails to show grounds for reversal.

Aerojet says the trial court's decision was based on the lack of exhaustion of underlying primary coverage, but that reasoning does not apply to the 1976-85 excess policies because in those years there was no underlying primary coverage to exhaust. In those years, Aerojet was "self-insured." Aerojet cites *Montgomery Ward & Co. v. Imperial Casualty & Indemnity Co*. (2000) 81 Cal.App.4th 356, 364, for the proposition that "[self-insured retentions] are not primary insurance" and therefore the usual exhaustion approach does not apply.

However, *Montgomery Ward* was decided based upon contract language making it clear there was a difference between underlying insurance and retained limits. (*Montgomery Ward,*

supra, 81 Cal.App.4th at p. 367.) Here, Aerojet presents no such analysis of the contract language at issue and has therefore waived the matter. (*In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3 [waiver of contentions unsupported by analysis].)

VII. The Pollution Exclusion

Aerojet contends the trial court in an earlier ruling erred in basing summary adjudication for eight insurers on the "sudden and accidental" pollution exclusion. Since the briefs were filed in this appeal, we have issued an opinion that rejected this argument in the prior appeal, C035040, nonpublished opinion filed February 28, 2002. We see no reason to revisit the matter.

VIII. The Cross-Appeal

A cross-appeal was filed by U.S. Fire, for itself and on behalf of American Home Assurance Company, Columbia Casualty Company, Commercial Union Insurance Company, Continental Insurance Company, The Home Insurance Company, The Insurance Company of the State of Pennsylvania, New England Reinsurance Company, and Transcontinental Insurance Company. (See fn. 3, *ante*.)

The notice of cross-appeal, which delimits the scope of review (rule 1(a); 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 202, p. 255), limited the cross-appeal to "that part of the judgment [reflecting the court order dated September 18, 2000] denying the motions for summary adjudication that certain excess insurers have no prospective duty to defend based on the

Court's earlier ruling that they have no duty to indemnify. Specifically, [these insurers] cross-appeal from that part of the judgment incorporating the Court's September 18, 2000 order denying insurers' motions for summary adjudication as to the duty to defend based on having no duty to indemnify."

As indicated, the trial court made three rulings in this case: (1) the Indemnity Ruling that certain insurers had no duty to indemnify Aerojet due to pollution exclusions in their policies; (2) the Defense Ruling *denying* certain insurers' motions (presumably by insurers which had pollution exclusions in their policies) seeking summary adjudication that the Indemnity Ruling necessarily negated any duty to defend; and (3) the Exhaustion Ruling concerning exhaustion of primary coverage to trigger excess coverage.

Thus, the cross-appeal involves only the Defense Ruling and prospective duty to defend. Cross-appellants' position is that the Indemnity Ruling necessarily terminated any prospective duty to defend, because there is no duty to defend where there is no potential for coverage, but the trial court erroneously believed that only an *appellate court* decision affirming a no-duty-to-indemnify judgment could terminate an insurer's duty to defend. Cross-appellants assert they are entitled to summary judgment.

Presumably, cross-appellants all had pollution exclusions in their policies (since the judgment reflects the insurers involved in the Defense Ruling were also involved in the Indemnity Ruling). Thus, if they could succeed on this cross-appeal, they could get out of the case completely, regardless of

any future potential for Aerojet to show exhaustion of primary coverage so as to trigger excess coverage (per our disposition of the appeal).

However, cross-appellants fail to meet their burden on the cross-appeal. Cross-appellants have the burden "of affirmatively showing error by an adequate record. [Citation.]" (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794, see also, former rule 15 and current rule 14(a)(1)(C) [requiring citation to evidence in the record].) An appellate court reviews the trial court's decision to grant summary judgment de novo. The appellate court reviews the ruling, not the rationale. In reviewing the summary judgment, the appellate court applies the same three-step analysis used by the superior court: the appellate court (1) identifies the issues framed by the pleadings; (2) determines whether the moving party has shown that the opponent's claims cannot be established; and (3) determines whether the opposition has demonstrated the existence of a triable, material factual issue. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th 826, 843.)

Here, nowhere in cross-appellants' opening brief do they cite to the record to show the location of any of the moving papers or even the separate statements of undisputed facts (Code Civ. Proc., § 437c, subd. (b)) which are the subject of the

cross-appeal. They cite only to the reporter's transcript of the hearing, the order and the judgment.[20]

We recognize cross-appellants view the issue as one of law. Nevertheless, this court does not decide legal questions in a vacuum.

We conclude cross-appellants have failed to meet their burden of showing error on the record of the cross-appeal.

Additionally, we disregard arguments in the cross-appellants' *reply* brief which address the merits of the *appeal* rather than the *cross-appeal*. Former rule 14(d), the substance of which is retained in new rule 16 effective January 1, 2002, confines a cross-appellant's reply brief to points raised in its cross-appeal.

We accordingly reject the cross-appeal.

DISPOSITION

The appeal in C036514 is dismissed.

The judgment in C037097 is modified as follows:

In the trial court's order on motion for summary adjudication dated July 14, 2000, delete the words "and, in the Court's view, can never do so," from page 4, line 14.

In the "JUDGMENT IN FAVOR OF CERTAIN INSURER DEFENDANTS," dated September 26, 2000, insert the word "present" before the

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[20] The cross-appellants' opening brief does contain other citations to the record, but none relevant to the cross-appeal. We note the cross-appellants' opening brief was filed by counsel for U.S. Fire as a combined respondent's brief in the main appeal and cross-appellant's opening brief. Other respondents filed a separate respondents' brief, in which U.S. Fire joined.

word “duty” in page 2, line 12, so that the line reads “following insurers had no present duty to defend or indemnify Aerojet . . . .”

Similarly, in the parallel “JUDGMENT IN FAVOR OF [CIGA],” dated September 26, 2000, insert the word “present” before the word “duty” in page 1, line 25.

The judgments in C037097 are affirmed as modified.

In both appeals, the parties shall bear their own costs on appeal. (Rule 26(a).)

SIMS, Acting P.J.

We concur:

NICHOLSON, J.

KOLKEY, J.